

REMARKS

Claims 1-8, 20-28 and 30 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over Claims 1-14 of U.S. Patent No. 6,473,511. Examiner admits that the conflicting claims are not identical but alleges they are not patentably distinct from each other because Claims 1-14 of U.S. Patent No. 6,473,511 are similar in scope to Claims 1-8, 20-28 and 30 of the U.S. patent application 09/524,501 with obvious wording variations.

1) Applicants respectfully submit that the pending claims are patentably distinct from those of the '511 patent.

A point-by-point comparison of the claim limitations in each will illustrate this distinction:

<u>'511 Patent</u>	<u>App. No. 09/524,501 Application</u>
a) hearing aid	a) battery (not a hearing aid)
b) metal air battery	b) battery shaped to fit in ear canal
c) no mention of shape of battery	c) no mention of metal/air
d) mechanical switch to deprive battery of air	d) no mention of switch
e) no shell	e) metal shell, plastic cathode

The Examiner has not cited any prior art to show that the claims in the application are a mere obvious variation of the claims in the '511 patent to support the double patenting rejection. See *In re Kaplan*, 279 USPQ 678.

Therefore, in view of the numerous non-obvious claim differences listed above, the rejection based upon 37 C.F.R. 3.13(b) is respectfully traversed and reconsideration requested.

2) Claim 21 has been canceled and Claims 1-8 and 20 and 22-28 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite and are now believed to be clarified by the above amendments.

3) The drawings stand objected to under 37 C.F.R. 1.83(a) based on the conclusion that the limitation “battery including an elliptical cross-section” is not shown.

Applicants submit that the item now identified as 24C in Fig. 17 coupled with the above requested amendment to the Specification at page 26, line 23 should fully satisfy 35 C.F.R. 1.83(a). If this is not acceptable, a telephone call to the undersigned would be appreciated.

4) Claims 1-3, 5, 7-8 and 20 rejected under 35 U.S.C. 102(b) as being anticipated by Narisawa (US 5,347,584) (herein the ‘584 patent) have been extensively amended to more clearly define the invention over the ‘584 patent.

For example, independent Claims 1 and 24 now patentably distinguish over the disc-shaped prior art non-customized button type battery 28 of the ‘584 patent. The battery 20 has a thin axial dimension and is not shaped to fit into a longitudinal portion of the ear canal (Claim 1) and moreover, is incapable of providing a sufficient supply of electrolyte to operate a 30-day disposable battery (Claim 21) or wherein the diameter of the battery is disposed transverse the ear canal unlike Fig. 4, item 28 of ‘584 patent.

The battery in ‘584 patent is not configured or “shaped to substantially conform to a portion of the ear canal” (Claims 1 and 20). Instead, such batteries are of uniform standard thin “button” shape to fit into a device such as a camera battery housing with the diameter to thickness ratio being very large. The ‘584 patent clearly does not teach a “custom” made battery shaped to “conform to a portion of the ear canal” (Claim 1). Neither does it teach or show a battery in which the diameter dimension extends transverse the ear canal (Claim 2).

Claims 5 and 7-9 are dependent claims and are, therefore, allowable for the reasons given above for allowance of the base claims.

5) Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Narisawa (US 5,347,584) on the basis that “providing a suitable battery for a disposable hearing aid is very well known in the art and it therefore would have been obvious to one having ordinary skill in the art at the time the invention was made to be motivated to provide the battery for a disposable hearing aid, in order to utilize the battery and operate the disposable hearing aid.”

Applicant respectfully requests reconsideration of this basis for rejection. At the time the invention was made, disposable hearing aids were not well known in the art. To the contrary, according to Applicants knowledge, the first disposable hearing aid was disclosed in patent application no. 08/815,852 filed March 12, 1997 which issued as U.S. Patent 5,881,159 on March 9, 1999. Note that the patent application claims priority to this March 12, 1997 application. So that at the time of the present application, it was not obvious to provide a custom made battery for a disposable hearing aid. There was no suggestion in the art why such a battery was needed or how it could be made sufficiently inexpensive to be disposable.

6) Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of Narisawa (US 5,347,584) in view of Oltman et al. (US 4,343,869) button cell having an elliptical cross-sectioned configuration.

There is no suggestion in either reference for the proposed combination. Why would one want to make a button type battery with an elliptical cross-section? Reconsideration of this ground for rejection of Claim 6 is requested.

7) Claims 21-28 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oltman et al. (US 4,343,869).

Claim 24 has been canceled and remaining independent Claim 21 extensively amended to specify that the hearing aid battery has a large length dimension and an L/D ratio which is large enough to provide a battery life of at least 30 days operation.

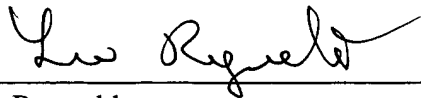
Accordingly, Claim 21 and the remaining dependent claims are now believed to be patentably non-obvious over the '869 reference.

CONCLUSION

In view of the above amendments and remarks, it is believed that all claims are in condition for allowance, and it is respectfully requested that the application be passed to issue. If the Examiner feels that a telephone conference would expedite prosecution of this case, the Examiner is invited to call the undersigned.

Respectfully submitted,

HAMILTON, BROOK, SMITH & REYNOLDS, P.C.

By 
Leo R. Reynolds
Registration No. 20,884
Telephone: (978) 341-0036
Facsimile: (978) 341-0136

Concord, MA 01742-9133

Dated: 10/17/07